



## STATEMENT OF THE CASE

Appellant-Defendant, Jimmy Lee Robinson (Robinson), appeals his conviction for possession of cocaine, a Class D felony, Ind. Code § 35-48-4-6(a).

## ISSUES

Robinson raises two issues on appeal, which we restate as follows:

- (1) Whether the vehicle search was unreasonable pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution; and
- (2) Whether the State failed in providing evidence sufficient to support Robinson's conviction for possession of cocaine beyond a reasonable doubt because Barbara Wright's (Wright) testimony was incredibly dubious.

## FACTS AND PROCEDURAL HISTORY

On June 16, 2007, Robinson was driving in a maroon Cadillac with his girlfriend, Barbara Wright (Wright), in Evansville, Indiana. Officer Craig Pierce of the Evansville Police Department (Officer Pierce) noticed the Cadillac cross the centerline several times. When he ran the vehicle's license plate, it came back as belonging to a different vehicle. Officer Pierce decided to initiate a traffic stop. As the vehicle was slowly moving to a stop, Officer Pierce saw the male driver, later identified as Robinson, and female passenger, later identified as Wright, switch seats.

After the car came to a complete stop, Officer Pierce walked to the passenger side of the vehicle. While approaching the passenger side's door, he observed Robinson "bending

over like he was stuffing some thing in the seat.” (Transcript p. 9). As Officer Pierce got to the passenger’s side door, he could still see Robinson through the window, bent over. The Officer grabbed the door and opened it, figuring “he might have a gun or some thing.” (Tr. p. 9). He ordered Robinson to exit the vehicle, handcuffed him, and instructed him to sit on the curb. At that time, Robinson explained to Officer Pierce that he and Wright had switched seats because he was driving without a driver’s license.

About the time that back-up officers began to arrive, Officer Pierce approached the driver’s side of the vehicle and observed Wright trying to reach under the passenger seat. Subsequently, he asked her to exit the vehicle and handcuffed her. Officer Pierce confirmed that Wright did not possess a valid driver’s license.

Once Robinson and Wright were out of the vehicle and handcuffed, Officer Pierce returned to the car and searched under the Cadillac’s passenger seat. Under the seat, Officer Pierce found an off-white, rock-like substance that later tested positive for cocaine. Believing that Robinson possessed the cocaine and put it underneath the passenger seat to hide it, Officer Pierce arrested him. Robinson insisted to Officer Pierce that Wright had purchased the cocaine and that she was the owner. The Officer wrote Wright a ticket for driving while suspended but did not charge her with regard to the contraband.

On June 19, 2007, the State filed an Information, charging Robinson with Count I, possession of cocaine, a Class D felony, I.C. § 35-48-4-6(a). Prior to Robinson’s trial, Wright contacted defense counsel on several occasions and stated that the cocaine belonged to her, and not to Robinson. Additionally, Wright executed a notarized statement, which she

provided to the Vanderburgh County Prosecutor's Office, in which she admitted that the cocaine belonged to her. Wright also sent a letter to Robinson while he was in jail admitting the same. At trial, Wright recanted her pre-trial statements and insisted that the cocaine belonged to Robinson. She clarified that she had only claimed possession earlier because she was under duress and terrified of him. Wright also stated at trial that there was an action pending to terminate her parental rights based upon her admission to possessing the cocaine.

On August 3, 2007, the trial court conducted a bench trial. At the close of the evidence the trial court found Robinson guilty as charged. On September 6, 2007, the trial court sentenced Robinson to eighteen months executed and ordered his sentence to run consecutively to a sentence imposed in an unrelated case. An abstract of judgment was entered on September 11, 2007.

Robinson now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Search and Seizure*

Robinson first contends that Officer Pierce's search of his vehicle was illegal under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. We review the trial court's admission of evidence for an abuse of discretion. *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Initially, we note that Robinson failed to object to Officer Pierce's testimony concerning the search. Only after the State rested its case, Robinson's counsel moved to dismiss the charges and to suppress evidence, asserting the search was illegal. To claim error in the admission of evidence, a party must have made "a timely objection . . . stating the specific ground of objection." Ind. Evid. Rule 103(a)(1). An objection is generally timely if it is made "before the answer is given." *Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995). On appeal, a party may not assert that the trial court erred by overruling a motion seeking the exclusion of evidence unless the party objected to the evidence at the time it was offered. *Sisk v. State*, 748 N.E.2d 861, 864 (Ind. 2000). As Robinson failed to timely object to the introduction of the evidence, he waived his claim for appellate review. *Luna v. State*, 758 N.E.2d 515, 518 (Ind. 2001). Waiver notwithstanding, we will address his claim on its merits.

#### A. *Fourth Amendment*

Robinson contends that the trial court erred in admitting Officer Pierce's testimony regarding the search and resulting discovery of the cocaine. Specifically, he characterizes Officer Pierce's search of the vehicle as an illegal inventory search. The State, seizing on Robinson's characterization of an inventory search, appears to argue that "because [Robinson] was driving without a license," the Officer was allowed to conduct an inventory search. (Appellee's Brief p. 10).

The Fourth Amendment to the United States Constitution provides, in pertinent part: "[t]he right of people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. Amend. IV. The Fourth Amendment’s protection against unreasonable searches and seizures has been extended to the States through the Fourteenth Amendment. *Sanchez v. State*, 803 N.E.2d 215, 219 (Ind. Ct. App. 2004), *trans. denied*.

While a valid inventory search is a well-recognized exception to the warrant requirement, we find that the inventory exception does not apply as the cocaine had already been discovered. Our review of the record reveals that Officer Pierce entered the vehicle and found the cocaine prior to commencing the inventory search. In particular, on re-direct, the following colloquy took place between the State and Officer Pierce:

[STATE]: Now when you looked underneath the passenger’s seat, was that before or during the course of the inventory?

[OFFICER PIERCE]: It was just prior to that.

(Tr. p. 28).

Nevertheless, based on the evidence, we conclude that the trial court did not abuse its discretion in admitting the evidence as the search was valid under the search incident to arrest exception to the Fourth Amendment. A search incident to a lawful arrest is another exception to the warrant requirement of the Fourth Amendment. “An arrest is lawful if it is supported by probable cause.” *Fentress v. State*, 863 N.E.2d 420, 423 (Ind. Ct. App. 2007). Probable cause for an arrest exists if at the time of the arrest the officer has knowledge of facts and circumstances which would warrant a man of reasonable caution to believe that the suspect has committed the criminal act in question. *Id.* A police officer’s subjective belief concerning whether he had probable cause to arrest a defendant has no legal effect. *Id.*

Furthermore, a suspect is considered under arrest when a police officer interrupts the freedom of the accused and restricts his liberty of movement. *Id.* The fact that a police officer does not inform a defendant he is under arrest prior to a search does not invalidate the search incident to arrest exception as long as there is probable cause to make an arrest. *Id.*

Here, Officer Pierce testified that when driving behind Robinson's vehicle, he noticed that Robinson was driving the Cadillac. Upon activating his lights, he observed Robinson and Wright switch places while the car was slowly moving. As soon as Robinson exited the vehicle, he admitted to not having a driver's license. At that time, Officer Pierce placed Robinson in handcuffs. Based on Officer Pierce's observation and Robinson's admission, we conclude that the officer had probable cause to arrest Robinson.

A search incident to a lawful arrest allows the arresting officer to conduct a warrantless search of the arrestee's person and the area within his or her immediate control. *Id.* The search of a defendant's automobile under this exception is valid even when the automobile is no longer in the defendant's area of control. *Stevens v. State*, 701 N.E.2d 277, 280 (Ind. Ct. App. 1998). Accordingly, Officer Pierce's search of Robinson's vehicle was valid and the trial court properly admitted the officer's testimony regarding the search.

#### *B. Article I, Section 11 Indiana Constitution*

Robinson also asserts that the search was invalid under the Indiana Constitution. Specifically, he claims that in light of the totality of the circumstances, the search was unreasonable. Article I, section 11 provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable search or seizure, shall not be

violated . . .” Automobiles are among the “effects” protected by Article I, section 11. *Taylor v. State*, 842 N.E.2d 327, 331 (Ind. 2006). Although section 11 appears to have been derived from the Fourth Amendment and shares very similar language, we interpret and apply it independently from Fourth Amendment jurisprudence. *Id.* at 334. The purpose of Article I, section 11 is to protect from unreasonable police activity those areas of life that Hoosiers regard as private. *Id.* In determining whether the police behavior was reasonable under section 11, both trial and appellate courts must consider each case on its own facts and construe the constitutional provision liberally so as to guarantee the rights of people against unreasonable searches and seizures. *Id.*

The question is whether under the totality of the circumstances, reliance by the police upon their own information in deciding to search appellant’s car was reasonable. *State v. Moore*, 796 N.E.2d 764, 767 (Ind. Ct. App. 2003), *trans. denied*. The totality of the circumstances requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search or seizure. *Litchfield v. State*, 824 N.E.2d 356, 360 (Ind. 2005). In sum, the reasonableness of a search or seizure turns on a balance of:

1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and 3) the extent of law enforcement needs.

*Id.* at 361.

In support of his argument, Robinson relies on *Moore v. State*, 796 N.E.2d 764 (Ind. Ct. App. 2003). In *Moore*, Officer Zotz initiated a traffic stop of the vehicle Moore was



driving because he had failed to signal a left turn. *Id.* at 765. After Officer Zotz learned that Moore’s license was suspended, he asked Moore to exit the car and placed him under arrest. *Id.* The two other passengers in the car were removed by a second officer. *Id.* During a subsequent search of the vehicle, Officer Zotz found a handgun under the driver’s seat. *Id.* Moore admitted that the gun belonged to him. *Id.* Analyzing the situation under Article I, section 11 of the Indiana Constitution, we concluded the search to be unreasonable. *Id.* at 771. There was no evidence that Moore and the two other passengers were anything but cooperative, they provided the officers with the correct information, and there is no indication that anyone resisted the officers’ orders. *Id.* at 770. Upon finding the handgun, Moore immediately admitted ownership thereof. *Id.* A second officer had control over the two passengers. *Id.* at 770-71. Finally, Officer Zotz did not indicate that he was ever fearful for his safety. *Id.* at 771. Furthermore, we were unable to deduce any fact indicating that Officer Zotz needed to search the car to find and preserve evidence connected to the crime of driving while suspended. *Id.* Accordingly, we concluded that the search of the car was not reasonable under the totality of the circumstances presented. *Id.*

We find *Moore* to be inapposite to the case at hand. The record reflects that after initiating a traffic stop, Robinson failed to stop immediately. Instead, while moving slowly, Robinson and Wright switched places—Wright becoming the driver and Robinson the passenger. After the car eventually stopped, Officer Pierce noticed Wright “bending over like he was stuffing some thing in the seat.” (Tr. p. 9). As Officer Pierce got to the passenger’s side door, he could still see Robinson through the window, bent over. The

Officer grabbed the door and opened it. He testified that he thought Robinson “might have a gun or some thing.” (Tr. p. 9). After exiting the car, Robinson readily admitted to not having a driver’s license. Officer Pierce handcuffed him. In the meanwhile, Officer Pierce noticed that Wright was trying to reach under the passenger seat. After handcuffing Wright, Officer Pierce searched the vehicle and discovered cocaine under the passenger seat.

While Robinson’s admission of a lack of driver’s license explains the musical chairs game in the car, it fails to explain Robinson’s furtive movements once the car came to a stop. Robinson’s continued action of bending forward and reaching underneath the passenger seat justified a heightened safety concern for Officer Pierce. After handcuffing both Robinson and Wright, Officer Pierce merely searched underneath the passenger seat. In view of the totality of the circumstances, we conclude that Officer Pierce’s search of the vehicle was reasonable.

## II. *Incredibly Dubious Testimony*

Next, Robinson argues that the State did not present sufficient evidence to support his conviction because Wright’s testimony was incredibly dubious. Under the incredible dubiousity rule, a court will impinge on the jury’s responsibility to judge the credibility of the witness only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. *White v. State*, 706 N.E.2d 1078, 1079 (Ind. 1999) (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)); *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001), *cert. denied*, 534 U.S. 1105 (2002). “When a sole witness presents inherently improbable testimony and there is a complete lack

of circumstantial evidence, a defendant's conviction may be reversed." *White*, 706 N.E.2d at 1079. However, we have recognized that the application of this rule is rare and is limited to cases where the sole witness' testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Stephenson*, 742 N.E.2d at 497. Additionally, our supreme court has stated that inconsistencies between a witness' pretrial statements and her trial testimony do not render her testimony inherently contradictory as a result of coercion. *Corbett v. State*, 764 N.E.2d 622, 626 (Ind. 2002).

We conclude that Wright's testimony does not fall within the incredible dubiousity rule. Although Robinson raises legitimate issues regarding Wright's credibility by pointing to her inconsistent pre-trial statements admitting to ownership of the cocaine and her subsequent recanting at trial, these issues were placed squarely before the trial court. At trial, Robinson extensively cross-examined Wright about the change in her story and her reason for recanting at trial. Nevertheless, faced with Wright's changed testimony, the trial court, in carrying out its role as trier of fact, apparently found Wright's testimony worthy of credit. *See, e.g., Albrecht v. State*, 737 N.E.2d 719, 733 (Ind. 2000), *reh'g denied* (a witness who initially provided an alibi for the defendant, but changed his story after police threatened him with prosecution and incarceration, could still have been found credible by the jury).

In addition, the trial court need not have relied solely on Wright's testimony to convict Robinson. The record contains sufficient evidence to support the trial court's determination that Robinson possessed the cocaine, and not Wright. Robinson admitted that he drove Wright to the location where the cocaine was ultimately purchased. Although he testified

that he was unaware as to Wright's reasons for stopping there, the trial court was under no obligation to believe that testimony. Further, when Officer Pierce initially approached the car, he observed Robinson leaning over and "stuffing some thing under the passenger seat." (Tr. p. 9). From this evidence, the trial court could have easily inferred that Robinson was attempting to hide his own cocaine, rather than Wright's. While we agree that inconsistencies exist between Wright's pre-trial statements and her testimony, those inconsistencies do not render her testimony inherently contradictory due to coercion. Consequently, we find that the State presented sufficient evidence beyond a reasonable doubt to support Robinson's conviction.

### CONCLUSION

Based on the foregoing, we conclude that Officer Pierce's search of the vehicle did not violate Robinson's rights under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Indiana Constitution; and we conclude that the State presented sufficient evidence to sustain Robinson's conviction.

Affirmed.

ROBB, J., concurs.

BAKER, C.J., concurring in result with separate opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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JIMMY LEE ROBINSON,	)	
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Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0711-CR-501
	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**Judge, Chief Judge, concurring in result.**

I concur with the result reached by the majority, but I write separately based on its resolution of the first issue. While the majority belabors Robinson’s argument regarding the propriety of the search and seizure, Robinson failed to object to the evidence until after the State had rested its case at trial. In light of the patent untimeliness of Robinson’s objection, I believe that he has waived appellate review of this claim and would decline to address it on the merits. I concur with the majority in all other respects.